IN THE
UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF NEW HAMPSHIRE

IMS HEALTH INCORPORATED, a Delaware corporation; and VERISPAN, LLC, a Delaware limited liability company, Plaintiffs, vs. KELLY A. AYOTTE, as Attorney General of the State of New Hampshire, Defendant.	)	Case No. 06-CV-280-PB

Plaintiffs' Reply to Defendant's Trial Memorandum

Thomas R. Julin & Patricia Acosta
Hunton & Williams LLP
Fla. Bar Nos. 325376 & 614599

1111 Brickell Avenue - Suite 2500
Miami, FL 33131
305.810.2516 Fax 2460
tjulin or pacosta@hunton.com

James P. Bassett & Jeffrey C. Spear
Orr & Reno, P.A.
N.H. Bar Nos. 358 & 14938

One Eagle Square
P.O. Box 3550
Concord, NH 03302-3550
603.223.9100 Fax 9000
jbassett or jspear@orr-reno.com

Attorneys for IMS Health Incorporated & Verispan, LLC

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

INTRODUCTION

The Attorney General begins by objecting to the plaintiffs' comparison of their publishing activities to those of daily newspapers.[1] "This is not, in fact, the nature of their business," the Attorney General argues, the "Plaintiffs sell data." (DE 66 at 2). The definition of "data" is "things known or assumed; facts or figures from which conclusions can be inferred; information." *Webster's New World Dictionary* at 360 (Simon & Schuster 2d. coll. ed. 1984). One could argue, then, that the *Concord Monitor*, the *Manchester Union Leader,* and others are also nothing more than the purveyors of "data." The newspaper analogy shows a fundamental flaw with the Attorney General's argument: it goes too far. It could be used to justify government censorship of any information merely by characterization of it as "data." The analogy also shows that the regulated information is in many ways as truthful and important as information carried in the daily news, that the law both targets content of speech and discriminates on the basis of viewpoint, and that the regulated information cannot fairly be characterized as simply commercial speech.

The state's focus on the nature of the plaintiffs' business and its pejorative portrayal of them as "data miners" betrays that the statute's objective is to discriminate against the viewpoint of those who regard use of prescriber-identifiable information as valuable to the improvement of public health through profitable and efficient private enterprise. The statute's focus on

[1] In the parties' joint discovery plan (DE 34), they agreed that plaintiffs would submit a trial memorandum on November 30, 2006, that the defendant would submit a responsive memo on December 15, 2006, and that plaintiffs would reply on December 29, 2006. This memorandum is the plaintiffs' reply. Both the plaintiffs and the Attorney General have designated their trial memos (DE 42 & 66) as their requests for rulings of law. (DE 68 ¶ 12 & DE 70 ¶ 12). The parties also have filed statements of fact (DE 43 & 67) with their trial memoranda and have asked that they be treated as requests for findings of fact. (DE 68 ¶ 12 & DE 70 ¶ 12).

preventing private enterprise from using the information in focused campaigns to lawfully sell products and its simultaneous endorsement of use of the same information by those who advocate against buying those same products (often irrespective of prescriber and patient preferences) reveals that the statute imposes viewpoint discrimination. "Viewpoint discrimination is . . . an egregious form of content discrimination" *Rosenberger v. Rector of Univ. of Va.* , 515 U.S. 819, 829 (1995), that is subject to strict scrutiny.

The Attorney General also focuses on the fact that the plaintiffs derive a profit from their publishing activities (DE 66 at 3), in derogation of the principle established in *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 420 (1993), that "commercial attributes of various forms of communication do not qualify their entitlement to constitutional protection." Both *The New York Times* and the lonely pamphleteer are entitled to the same First Amendment protection, although their profits may differ greatly.

Finally the Attorney General argues the law "was passed as a measure to control health care costs in New Hampshire, to protect the health and safety of new Hampshire citizens, and to protect the privacy of doctors and patients who use prescription drugs. (DE 66 at 3). The legislature ostensibly was persuaded by unreliable anecdotal evidence that focused marketing increases the risk that doctors will make bad decisions about which drugs to prescribe because doctors are so easily influenced and so poorly educated about how to make good prescription decisions, that they need government protection against focused marketing. As discussed below and as will be discussed in plaintiffs' objections to the Attorney General's Factual Summary, there was no evidence before the legislature and none has surfaced in discovery to show that doctors are any more influenced by *focused* marketing than *unfocused* marketing or that their decisions are any better or worse for their patients when the marketing is focused or unfocused.

THE STANDARD OF REVIEW

The Attorney General raises an important matter to which the Court previously alluded in the initial informal status conference with the Court in this case -- the level of deference that the Court must afford the New Hampshire legislature.

The Attorney General bases her deference argument on *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 626 (1994) ("*Turner I")* (plurality opinion) and *Turner Broadcasting System, Inc. v. FCC,* 520 U.S. 180, 195 (1997) (*"Turner II"*). In these cases, the Supreme Court reviewed a claim that a federal statute requiring cable operators to carry local broadcasters' programming violates the First Amendment. Justice Kennedy, writing for the plurality, observed that (1) Congress had acquired considerable expertise in cable regulation over decades, (2) Congress had developed over a three-year period tens of thousands of pages of evidence including not only anecdotal testimony, but extensive studies, (3) Congress expressly incorporated findings into the statute ultimately passed, and, perhaps most important, (4) the statute at issue was content neutral, so it did not create as serious a risk that it would be used as a statute that expressly targets speech content. Under these extraordinary and limited circumstances, the Court held: "[i]n reviewing the constitutionality of a statute, 'courts must accord substantial deference to the predictive judgments of Congress.' Our sole obligation is 'to assure that, in formulating its judgments, Congress has drawn reasonable inferences based on substantial evidence.'" *Turner II,* 520 U.S. at 186.

By contrast, the legislature here (1) had no established expertise in the regulation of prescriber-identifiable data, (2) acted quickly after initial introduction of the bill and only after hearing very little evidence and it was anecdotal, (3) did not make any express findings or incorporate them in the statute, and, as shown below, (4) enacted a content-based, rather than

content-neutral statute. Under these circumstances, the Court need not and should not afford any significant deference to the legislature whether it uses strict scrutiny or a lesser level of scrutiny because the record here at issue simply does not command such deference. *See* Note, *Deference to Legislative Fact Determinations in First Amendment Cases After Turner Broadcasting*, 111 Harv. L. Rev. 2312, 2327 (1997-98) ("[w]hen records fail to meet this threshold, legislative findings should command no special weight because they would fail to meet the only legitimate justification for deference: aiding accurate judicial decisionmaking"). Instead, it should "devote 'the most exacting scrutiny to [a] regulation[] that suppress[es], disadvantage[s], or impose[s] differential burdens on speech.'"[2]

"Deference to a legislative finding cannot limit judicial inquiry when First Amendment rights are at stake."[3] There is no disagreement that the judiciary should consider and acknowledge legislative determinations regarding constitutional law issues, but it is ultimately within the province of the judiciary to analyze whether a law violates constitutional guarantees.[4] "The most fundamental norm of First Amendment jurisprudence is the primacy accorded to the judicial branch in the assessment of free expression claims; this is based on the understanding that the Bill of Rights sought to remove decisions about free expression from the political

---

[2] *Nat'l Amusements, Inc. v. Town of Dedham*, 43 F.3d 731, 736 (1st Cir. 1995) (citing *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622 (1994) (Turner I) (plurality opinion) (emphasis added)). *See also* Note, *Deference to Legislative Fact Determinations in First Amendment Cases After Turner Broadcasting*, 111 Harv. L. Rev. 2312, 2324 (1997-98) (citing *Reno v. ACLU*, 521 U.S. 844 (1997) (post-*Turner II* strict scrutiny case refusing to defer to legislative findings and suggesting that the *Turner* Court's insistence on judicial deference was particular to the intermediate scrutiny context)).

[3] *Landmark Commc'ns, Inc. v. Virginia*, 435 U.S. 829, 843 (1978).

[4] *Sable Commc'ns of Cal., Inc. v. FCC*, 492 U.S. 115, 129 (1989) (holding that Communications Act amendments can constitutionally prohibit obscene telephone messages, but cannot deny adult access to indecent, but not obscene, telephone messages consistent with the First Amendment).

arena."[5] Courts possess "the dominant role when reviewing First Amendment challenges because of the reliance on Supreme Court review as the ultimate antidote to abuse,"[6] especially since legitimate legislation does not require the "prepar[ation] of any factual record, [for a legislative body to] articulate any reasons for its decisions, or even *have* any such reasons."[7]

The standard of review is also addressed in the plaintiffs' trial memorandum (DE 42 at 17-18), the Washington Legal Foundation amicus curiae brief (DE 37), and plaintiffs' objections to the Attorney General's motion to quash the plaintiffs' subpoena to Eli Lilly Co. (DE 77).

ARGUMENT

I.

The Prescription Restraint Law Violates the First Amendment

The Attorney General contends that the law does not regulate speech at all and therefore no First Amendment principles apply, that strict scrutiny is not applicable due to the commercial nature of the regulated speech, that the law can survive intermediate scrutiny, and that the law is not unduly vague. Each argument is incorrect.

Plaintiffs already have addressed the Attorney General's initial argument that the discretion of the legislature to regulate prescriber-identifiable data is unrestricted by the First

---

[5] *Deference to Legislative Fact Determinations*, *supra* note 33 at 2317 (citing Archibald Cox, *The Role of Congress in Constitutional Determinations*, 40 U. Cin. L. Rev. 199, 213 (1971)).

[6] *Id.* Heightened judicial scrutiny via strict scrutiny and intermediate scrutiny reflect the Supreme Court's "privileged status" in First Amendment cases because both standards "require courts to conduct searching review of asserted government interests, make exacting distinctions between protected and unprotected speech, and determine the existence of government interests and the effects of state action." *Id.*

[7] *Id.* at 2322. (emphasis in original) (citing *Turner I*, 512 u.s. 622, 666 (1994) (plurality opinion), *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307. 315 (1993), *Fullilove v. Klutznick*, 448 U.S. 448, 502 (1980) (Powell, J. concurring), *Sable*, 492 U.S. at 133 (Scalia, J. concurring)).

amendment in their trial memorandum. (DE 42 at 5-10). The Attorney General now cites *Roth v. United States*, 354 U.S. 476, 484 (1957), as supporting her argument (DE 66 at 9), but *Roth* held only that the First Amendment permits criminalization of obscenity. *Id.* at 484. The decision has no applicability here. Similarly, the Attorney General's reliance on *Virginia Board of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 756 (1976) (DE 42 at 10), is misplaced because it held that a Virginia statute that prohibited advertising of pharmaceutical prices *is* subject to heightened First Amendment scrutiny because the consumers have an interest in obtaining the information.

Without case authority for the proposition that the statute does not regulate speech, the Attorney General again turns to a law review article, this time Katherine A. Moerke, *Free Speech to a Machine? Encryption Software Source Code is not Constitutionally Protected Speech*, 84 Minn. L. Rev. 1007, 1009 (2000), to advance her position. But this article deals only with computer source code and concludes that even though source code might not itself be speech, it may be entitled to First Amendment protection because it "protects the ability to speak privately." Subsequent judicial decisions have agreed that regulation of source code is constrained by First Amendment's prohibition against abridging freedom of speech.[8] One such decision points to numerous cases that have subjected to First Amendment scrutiny restrictions on the dissemination of technical information, scientific data, and mere instructions.[9] While the

---

[8] *See, e.g., Universal City Studios, Inc. v. Corley*, 273 F.3d 429, 446 (2d Cir. 2001) ("Even dry information, devoid of advocacy, political relevance, or artistic expression, has been accorded First Amendment protection"); *Junger v. Daly,* 209 F.3d 481, 485 (6th Cir. 2000) ("Because computer source code is an expressive means for the exchange of information and ideas about computer programming, we hold that it is protected by the First Amendment").

[9] *Corley*, 273 F.3d at 447 (citing *Herceg v. Hustler Magazine, Inc.,* 814 F.2d 1017, 1020-25 (5th Cir.1987) (First Amendment protects instructions for engaging in a dangerous sex act); *Bernstein v. United States Dep't of State,* 922 F. Supp. 1426, 1435 (N.D. Cal. 1996)

First Amendment surely does protect the expression of ideas, as the Attorney General argues, it is incorrect that the First Amendment protects *only* fully formulated ideas and not the expression of information upon which ideas are formed. Without "data" showing that prescribers are choosing one drug rather than another, it is difficult or impossible to advocate to those doctors the idea that they could make better or worse decisions regarding the welfare of their patients.

The Attorney General's contention that the law "does not impede the free flow of information" (DE 66 at 11) is contradicted by the law itself which expressly criminalizes the sale, use, transfer, or licensing of prescriber identifiable data for certain commercial purposes.

The Supreme Court's decision in *Bartnicki v. Vopper*, 532 U.S. 514 (2001), far from supporting the Attorney General's position (DE 11), directly undermines it. There, the Court held unconstitutional as applied 18 U.S.C. § 2511(1)(c), a part of a federal statute that prohibited a reporter from disclosing truthful information that a third party had unlawfully intercepted from a cell phone call. The reporter himself had not obtained the information in violation of the law, but the law prohibited the reporter's disclosure of it. The Court noted that other parts of the statute 18 U.S.C. § 2511(b) and (d) prohibited the *uses* of devices to unlawfully intercept cell phone communications and the *use* of *unlawfully* intercepted communications. It distinguished these other parts of the statute as constitutional because they regulated *unlawful* conduct. It did not, as the Attorney General asserts, hold laws that prohibits the use of *lawfully* obtained information are constitutional. The case did just the opposite, holding that criminalization of the reporter's use of lawfully obtained information violate the First Amendment.

The Attorney General's reliance on cases upholding statutes such as bar rules, securities

("Instructions, do-it-yourself manuals, [and] recipes" are all "speech"); *United States v. Progressive, Inc.,* 467 F. Supp. 990 (W.D. Wis. 1979) (scientific data), *Bd. of Trustees of Leland Stanford Jr. Univ. v. Sullivan,* 773 F. Supp. 472, 473 (D.D.C. 1991) (same)).

laws, labor laws, and copyright laws against First Amendment challenges also is misplaced (DE 66 at 13), because none of the governmental interests that justified those laws are present in this case and none of those cases held that the First Amendment imposes no restrictions on the discretion of a legislative body to regulate speech such as that at issue here

The Attorney General asserts that "Plaintiffs themselves admit that the Act does not prevent them from speaking *about* commercial transactions, but rather regulates the transactions themselves." (DE 66 at 14). This is incorrect. The statute could not be more clear that if a pharmacy or similar entity intends to transfer prescriber-identifiable data for a prohibited commercial purpose, then that speech is made illegal. The statute does allow a pharmacy to communicate the information if it has no commercial purpose in doing so. This again demonstrates that the legislature is attacking the viewpoint of those engaged in the communication. "In the realm of private speech or expression, government regulation may not favor one speaker over another." *Rosenberger*, 515 U.S at 828. Moreover, "[w]hen government targets not subject matter but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant. . . . Viewpoint discrimination is thus an egregious form of content discrimination." *Id*. Here, by prohibiting use of the information for certain commercial purposes, but by allowing use of the information for other commercial purposes and for non-commercial purposes, the State reveals its objective -- to suppress expression that would advocate the sale of pharmaceutical products that the State believes might increase the cost of healthcare and, consequently, its own liability for Medicaid and Medicare Part D patients. It plainly does not want expressed to prescribers the idea that newer, more expensive drugs just might improve patient health significantly more than older, less expensive drugs, or at least not expressed in any focused manner to those prescribers to whom such an expression might be most

relevant. Instead, the State has chosen to favor insurers, employers, and others who typically share the viewpoint that less expensive drugs should be prescribed for patients. The doctrine against viewpoint discrimination expressly prohibits this type of practice. "It is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys." *Rosenberger,* 515 U.S. at 828 (citing *Police Dept. of Chicago v. Mosley,* 408 U.S. 92, 96 (1972)). This doctrine is grounded in the fundamental notion that in a democratic society citizens remain free only if they have information that they need to make important decisions. Where the government regulates the flow of information because of disagreement with its content, the society is no longer free or democratic. The New Hampshire legislature may sincerely believe that it knows best what information prescribers should receive to make good decisions for their patients, but the First Amendment prohibits the legislature from using its power to prevent those with different ideas from expressing those ideas as well or from obtaining information they need to focus their ideas on those who will find the ideas relevant.

Because strict scrutiny applies in this case, the Court should rule for the plaintiffs because the Attorney General advances only the most perfunctory argument that the law could survive strict scrutiny (DE 66 at 24) while plainly it cannot. *See* DE 42 at 16-33 (explaining why the law cannot survive strict scrutiny). The Attorney General cites *no* authority that the interests it seeks to advance are compelling and *no* evidence showing that the statute is the least restrictive means of achieving its objectives.

The Attorney General alternatively asks the Court to apply the intermediate scrutiny test because the statute on its face restricts use of information for only certain commercial purposes, and not others or for "non-commercial" purposes. In *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 423 n. 19 (1993), the Court cautioned against the use of such terminology due

to the difficulties associated with distinguishing between commercial and non-commercial publications. The evidence in this case certainly has borne out that industry professionals have no means of determining whether a pharmaceutical company's use of prescriber-identifiable data in various instances would be regarded as for a commercial or non-commercial purpose. *See, e.g. ,* Depos. Dr. Goran Ando at 31-32, 56-57; August Dobish at 33-36; Dr. John Glaser at 58-59. As important, simply providing that a statute prohibits only speech for a "commercial purpose," does not mean that statute prohibits solely "commercial speech." Speech for a "commercial purpose" is a far broader category of speech than "commercial speech." (DE 42 at 11-13).

Even if the statute were regarded as regulating only commercial speech, it could not survive intermediate scrutiny for the reasons set forth in the plaintiffs' initial trial memorandum (DE 42 at 33-41). Plaintiffs' objections to the Attorney General's proposed factual findings will provide a discussion of the evidence relied upon for the intermediate scrutiny standard.

Regarding plaintiffs' vagueness arguments (DE 42 at 41-45), the Attorney General concedes that the law uses terms that are "undefined" (DE 66 at 28), "arguably inaccurate," (DE 66 at 28), that requires a determination of whether an entity is "similar to, a PBM, insurance company, electronic transmission intermediary, or pharmacy" (DE 66 at 29), that "renders the Act ambiguous" (DE 66 at 29), and that has a "long history of confusion" (DE 66 at 30). Far greater care than this is necessary where speech is being regulated. Laws are unconstitutionally vague where they fail to provide requisite notice and undermine public confidence that a law is equally enforced. *See City of Chicago v. Morales*, 527 U.S. 41 (1999); *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972); *United States v. Hilton*, 167 F.3d 61, 74-75 (1st Cir.1999). A statute must define an offense with sufficient particularity so that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary or

discriminatory enforcement. *Grayned*, 408 U.S. at 108; *Hilton*, 167 F.3d at 75. This statute imposes extraordinarily severe criminal penalties, authorizes civil claims for compensatory and punitive damages, authorizes class actions, and authorizes fee claims. It is incontestable that the vagueness of its terminology will lead to the chilling of speech that the legislature perhaps never intended to reach and that is fully protected by the First Amendment.

II.

The Prescription Restraint Law Violates the Commerce Clause

The State acknowledges that "[a] statute that reaches outside the borders of the state and controls commerce in another state will be held to *per se* violate the Commerce Clause." (DE 66 at 34). Yet, instead of rebutting plaintiffs' showing that the Prescription Restraint Law impermissibly regulates transactions that occur entirely outside of New Hampshire, the State engages in a tortured discussion of the standard for evaluating statutes that discriminate against out-of-state commerce or incidentally affect interstate commerce, even though the plaintiffs have never argued that the Prescription Restraint Law either discriminates against out-of-state commerce or incidentally affects it. The plaintiffs seek to invalidate the Prescription Restraint Law because it impermissibly regulates business activities that the plaintiffs conduct entirely outside of New Hampshire. "If a state law has the inevitable consequences of actually regulating (and not merely affecting) conduct outside the state, it runs afoul of the of the prohibitions entailed by negative implications of the Commerce Clause." Laurence H. Tribe, *The American Constitutional Law,* vol. 1 at 1078 (Foundation Press 3d ed 2000).

The Attorney General tries to defend the statute by arguing that it has no extraterritorial reach, but this conclusion cannot be made without making the statute a mere futility. The law ostensibly was enacted to shield prescribers from the perceived effects of focused marketing. To

unfocus marketing, the state made it unlawful for certain entities to transfer, license, use, or sell prescriber-identifiable information for those commercial purposes the legislature found objectionable. Although the law contains no express language making it applicable to wholly extraterritorial transactions, it would be completely ineffective if it had no such application because little or no licensing, transfer or sale of the prescriber identifiable information takes place within New Hampshire.

When New Hampshire pharmacies fill prescriptions, they electronically transmit information from them to their out-of-state parent companies which in turn transfer the information to insurance companies, software vendors, pharmacy benefit managers, and similar entities outside of New Hampshire for commercial and non-commercial purposes. *See, e.g.,* Dobish Depo at 18. These transactions are expressly allowed by the law. Health information companies, such as IMS Health and Verispan, both of which are outside of New Hampshire, then acquire the prescription information from these out-of-state entities. *See, e.g.,* Dobish Depo at 38-39. They then transfer the information to pharmaceutical manufacturers that also are located outside of New Hampshire. *See, e.g.,* Sadek Depo. at 10-11. Next, the out-of-state manufacturers use the information to decide how to guide their sales representatives and compensate their sales representatives, among other things. These decisions also take place outside of New Hampshire. If the law applies to these transactions, it plainly is governing transactions that take place entirely outside of New Hampshire in violation of the Dormant Commerce Clause. Although the Attorney General now disclaims that the statute has application to transactions entirely outside of New Hampshire, she also does not state what she means in this regard. If she disagrees that the statute applies to the transactions described here, the statute could not accomplish its objectives and it would fail even to survive rational basis

scrutiny under the First Amendment or the Due Process Clause. If she agrees that the law applies to these transactions, the law would violate the Dormant Commerce Clause. Caught on the horns of this dilemma, the Attorney General provides the Court only the vaguest description of how she believes that the statutes applies.

The statute's extraterritorial reach cannot be justified on the basis that the prescription information that the plaintiffs and the drug manufacturers acquire concerning New Hampshire prescribers originates in New Hampshire. *See Baldwin v. G.A.F. Seelig, Inc.,* 294 U.S. 511 (1935) (holding law that prohibited all milk dealers who sell in New York from buying milk below a certain price violated Dormant Commerce Clause through its implicit application to transactions in Vermont). Pursuant to "established doctrine . . . a state may not, in any form or under any guise, directly burden the prosecution of interstate businesses," because it "has no power to project its legislation into [another state]." *Id*. at 521-22. Just as it was impermissible in *Baldwin* for New York to require milk dealers to pay a minimum price for Vermont milk, so, too, it is impermissible for the New Hampshire to prohibit buyers from acquiring prescriber-identifiable information *outside* of New Hampshire.

Moreover, the impermissible extraterritorial reach of the statute in this case is no different than the statute held to be unconstitutional in *Pharmaceutical Research & Manufacturers of America v. District of Columbia*, 406 F. Supp. 2d 56 (D.C. 2005). The law in that case did not expressly apply to transactions wholly outside of the District of Columbia, it simply prohibited any drug manufacturer or licensee from selling patented prescription drugs if the sales would result in the drugs being sold in the District for an excessive price. *Id*. at 60. The government defended the statute as having no extraterritorial application because the language of the statute did not expressly provide it would apply to activity outside of the District and because it required

a sale at an excessive price in the District before a sale outside the District could violate the law. The court rejected both arguments, reasoning that it would be illogical to interpret the statute in a way that would render it inoperative and that the required sale in the District did not change the fact that the sale outside the district was being regulated.

The Prescription Restraint Law has precisely the same extraterritorial application and it is equally violative of the Dormant Commerce Clause. Neither the fact it is not expressly applicable outside of New Hampshire nor the fact that it does not render a transaction unlawful until the information that is the subject of the transaction is used for a prohibited commercial purpose within New Hampshire changes the fact that the law effectively regulates transactions that take place entirely outside of New Hampshire.

The Attorney General argues that *Baldwin* and *Pharmaceutical* do not apply because they involve the regulation of prices while the Prescription Restraint Law "has no direct effect on prices of any goods in this or any state . . . The Act does not affect the price of drugs." (DE 66 at 41). Not only is the Attorney General's claim inconsistent with claims she has made elsewhere,[10] the nature of the commerce regulated is irrelevant to the Court's inquiry on the Commerce Clause issue. "The critical inquiry is whether the practical effect of the regulation is to control conduct beyond the boundaries of the State."[11] *Healy v. Beer Inst.*, 491 U.S. 324, 336 (1989); *see also Brown-Forman Distillers Corp. v. New York State Liquor Author.,* 476 U.S. 573, 583 (1986) ("That the ABC Law is addressed only to sales of liquor in New York is

[10] For example, the first line of the state's trial memorandum begins: "House Bill 1346 was passed as a measure to control health care costs in New Hampshire." (DE 66 at 1).

[11] There is no inconsistency between the plaintiffs' arguments that the sale of information by a pharmacy is non-commercial speech for purposes of First Amendment analysis and that the sale should be regarded as "conduct" outside of New Hampshire's borders for purposes of the Dormant Commerce Clause because Dormant Commerce Clause doctrine does not make the same distinctions that First Amendment doctrine does.

irrelevant if the 'practical effect' of the law is to control liquor prices in other states" (citation omitted)). A state's general police powers to regulate matters of legitimate local concern, such as the health and safety of the citizens of New Hampshire, cannot justify its disregard for the Constitution's prohibition against regulating matters in other states.[12]

The Attorney General's reliance on *Foley Bros. v. Filardo*, 336 U.S. 281, 285 (1949), and *Taylor v. Rodale, Inc.*, 2004 WL 1196145 (E.D. Pa. 2004), is misplaced because neither case involved a challenge to a state statute under the Dormant Commerce Clause.[13] Unlike the plaintiffs in those cases, the plaintiffs here are seeking to *invalidate* a statute that must be interpreted as reaching activities outside of its borders if it is to have any meaning at all, not to require extraterritorial application of a statute that does not have such an express application.

CONCLUSION

The Court should invalidate the Prescription Restraint Law by severing its restrictions on *prescriber*-identifiable data and leaving in place its restrictions on *patient*-identifiable data because the law violates the First Amendment as an impermissible content-based restriction and the law and it suffers from vagueness and overbreadth and violates the Commerce Clause.

---

[12] *See Dean Milk Co. v. City of Madison*, 340 U.S. 349, 354 (1951) ("[The] view . . . that [an] ordinance is valid simply because it professes to be a health measure, would mean that the Commerce Clause itself imposes no limitations on state action other than those laid down by the Due Process Clause, save for the rare instance where a state artlessly discloses an avowed purpose to discriminate against interstate goods").

[13] *Foley* involved a federal statute governing the terms and conditions of laborers working pursuant to contracts in which the United States was a party. The Court in that case was asked to determine whether the federal statute may be applied to regulate the employment relationship of an employee who had worked in Iraq and Iran. The Court held that absent express language suggesting extraterritorial application, a federal statute should not be read to apply outside U.S. territory. Similarly, in *Taylor*, the Court was required to determine whether a Pennsylvania anti-discrimination statute could be applied to give a cause of action to an employee who neither worked nor lived in Pennsylvania. The Court found that it could not because state statutes should not be read to apply extraterritorially.

Respectfully submitted,

Hunton & Williams LLP

By /s/ Thomas R. Julin

Thomas R. Julin & Patricia Acosta
Fla. Bar Nos. 325376 & 614599
Admitted *Pro Hac Vice*
1111 Brickell Avenue - Suite 2500
Miami, FL 33131
305.810.2516 Fax 2460
tjulin or pacosta@hunton.com

Orr & Reno, P.A.
James P. Bassett & Jeffrey C. Spear
New Hampshire Bar Nos. 358 & 14938
One Eagle Square - P.O. Box 3550
Concord, NH 03302-3550
603.223.9100 Fax 9000
jbassett or jspear@orr-reno.com

Attorneys for IMS Health Incorporated and Verispan LLC

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served by electronic filing on December 29, 2006, to:

Richard Head
Assistant Attorney General of the State of New Hampshire
33 Capitol Street
Concord, NH 03301
603.271.3658 Fax 2110

s/Thomas R. Julin